

Matter of: Red River Service Corporation--
Entitlement to Costs

File: B-259462.2

Date: September 11, 1995

Theodore M. Bailey, Esq., Bailey, Shaw and Deadman, P.C.,
for the protester.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Request for declaration of entitlement to costs is denied
where earlier decision did not reach the merits of the
protest and agency did not take corrective action in
response to the protester's allegations.

DECISION

Red River Service Corporation requests that our Office
declare it entitled to recover the reasonable costs of
filing and pursuing its protest challenging the Department
of the Army's refusal to permit the protester to withdraw
its bid under solicitation No. DAHC77-94-B-0076 for refuse
collection services at Fort Schafter, Hawaii.

We deny the request.

Bids were opened on October 7, 1994. On October 10, the
Army advised Red River that it had submitted the apparent
low bid. Red River subsequently claimed a mistake in bid
and requested permission to withdraw. On November 17, the
Army denied the request and Red River then filed a pre-award
protest with this Office.

On January 3, 1995, the Army filed its agency report in
response to the protest; in addition to substantively
defending its refusal to permit withdrawal of the
protester's bid, the Army noted that the bid was due to
expire on January 5 and that, on December 13, 1994, Red
River had refused the agency's request to extend the bid
acceptance period. The Army indicated that it could still
make the award to Red River on the theory that its protest
before this Office operated to extend the bid acceptance
period.

On January 16, 1995, the protester's counsel filed lengthy comments in rebuttal to the agency's substantive position; at the end of the comments, counsel noted that the bid in question had, in fact, expired on January 5 and argued that the protest should, therefore, be dismissed because the Army was precluded from making an award in any event.

We dismissed the protest as academic noting that: "whether the protester prevails or not [on the merits] in the matter before us, the agency cannot make an award to the firm."

In its request for a declaration of entitlement to costs filed on March 22, Red River's counsel states in pertinent part:

"The GAO's dismissal on exactly the grounds argued by Red River in its comments on the agency report is, in essence, a decision sustaining Red River's protest that it should not receive award. Accordingly, since the agency continued to take an unreasonable position regarding award, a position which required Red River to continue to argue against award, Red River is entitled to recover the costs of pursuing this protest."

Our Bid Protest Regulations, 4 C.F.R. §§ 21.6(d) and (e) (1995), set forth the two circumstances under which we may find that a protester is entitled to recover protest costs.

Section 21.6(d) provides that if we determine that a solicitation, proposed award, or award does not comply with statute or regulation, we may declare the protester to be entitled to protest costs. If we do not make such a determination, then a claim for costs under this section is without foundation. See Miami Wall Sys., Inc.--Claim for Costs, B-227072.2, July 15, 1987, 87-2 CPD ¶ 49. Where, as here, a protest was properly dismissed as academic, there was no decision on the merits by our Office and thus no basis for award under section 21.6(d). Id. Accordingly, to the extent that Red River's request is based on this section of our Regulations, it is denied because, notwithstanding the protester's contention that our dismissal effectively sustained its protest, in fact, we never reached the merits of the case.

Under section 21.6(e), we may declare a protester entitled to costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. Where, however, a protest is rendered academic for reasons unrelated to the protest allegations, there is no corrective action because there is

no indication that the agency recognized the merit of the protest and took action to remedy the impropriety identified by the protester and, accordingly, there is no basis for awarding costs under section 21.6(e). See Digital Sys. Group, Inc.--Entitlement to Costs, B-257835.2, Apr. 3, 1995, 95-1 CPD ¶ 173.

In the present case, rather than recognizing the merit of the protest, the Army substantively defended its position in response to the protester's allegations and even attempted to obtain an extension of Red River's bid acceptance period. While Red River was able to avoid the contract award because of the expiration of its bid acceptance period, no corrective action was taken and, to the extent that Red River's request for costs may be read as invoking section 21.6(e), the request is without merit. Id.

The request is denied.

/s/ Christine S. Melody
for Robert P. Murphy
General Counsel